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Savings Bank Trust Deposits and Creditors' Rights

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essentially personal in its nature that no obligation survives the death of the promisor.⁸

We have found that this is a personal service contract. We have discovered that the general rule in New York and throughout the United States is that contracts involving personal service do not survive. The tendency of our courts is to abide by the rule laid down by precedent and judicial opinion where common justice and public policy do not demand a change.

The rule may seem harsh when we consider that the plaintiff is living a life of torture, unable to associate with friends and companions and with no means of support. But the inoculation took place six years prior to this agreement and formed no part of the consideration. The plaintiff knew what she was contracting for and, in our opinion, no injustice was wrought. It must be borne in mind that practical justice can only be the measure of what would be fair in the greatest number of cases.

Public policy in this case, far from being a reason for disregarding precedent, demands that the law should not be changed. The state is constantly endeavoring to improve health conditions and the courts should encourage this good work by refusing its aid to desperate persons, unwise persons—criminal offenders who, for pecuniary compensation, agree knowingly and foreseeingly to contracts which endanger their own health and that of the community. If we should allow recovery to this plaintiff who subjected herself absolutely to the control of a person to do as he saw fit, experimenting to the injury of her health, it would encourage other people to do likewise in similar cases.

THOMAS E. McDADE.

SAVINGS BANK TRUST DEPOSITS AND CREDITORS' RIGHTS.

It is today the law of this jurisdiction that where A deposits money in a savings bank in his own name, in trust for B, it does not in itself establish an irrevocable trust, during the life-time of the depositor, but is merely a tentative trust, revocable at the depositor's will, until his death or until such time as he completes the gift in his life-time by some unequivocal act or declaration. At his death a presumption arises that an absolute trust was created as to those funds

⁸ It might well be contended however that at the death of DeWitt, plaintiff's obligation under the contract had been fulfilled. The main object of the agreement being to allow *him* to experiment on her physical person, it follows that there was nothing more for her to do in pursuance of the contract, because the contemplated purpose of the contract had been effected.

remaining on deposit.¹ The legal effect of the savings bank deposit in this state has been developed through a series of interesting decisions, in which the courts have indicated an intention to keep step with the changing ideas and purposes of depositors with respect to this particular type of trust.

In an early case² decided by the Court of Appeals an intestate deposited \$500 in a savings bank, declaring that she wished the account opened in trust for the plaintiff, a distant relative. Entry was made on the books of the bank and on the pass-book, which was delivered to and retained by the intestate till after her death, no change being made in the account except that she drew out interest for one year. No other act or declaration bearing on her intention was shown. Plaintiff knew nothing of the deposit till after the death of the intestate. It was contended by the administrator who defended the action that the transaction did not transfer the property and that there was not a sufficient declaration of trust; that by retaining the pass-book, the intestate never parted with control of the property. The view of the court was that an *irrevocable* trust was created, the money having been deposited unqualifiedly and absolutely in trust, the intestate being the trustee. Her act in retaining the pass-book was viewed as not inconsistent with her acts as trustee of the fund. In arriving at this decision, the court was guided to a considerable degree by several early English cases, holding that an instrument executed as a present and complete assignment is equivalent to a declaration of trust; but it is interesting to note in view of the construction subsequently given to the tentative trust in this jurisdiction, that these cases did not involve savings bank deposits.³

The passing of years was marked by a rapid expansion of business and the banks became more firmly established in the confidence of the public. The courts were faced with new problems and changed conditions. By subsequent decisions the law with relation to savings bank trust deposits advanced a step. In *Mabie v. Bailey*⁴ money was deposited by the decedent in trust for the beneficiary. Decedent showed the pass-book to the beneficiary's mother and, in subsequent conversations, recognized the deposits as a provision for the family, no change of intention on his part being indicated. In giving judgment for the beneficiary, the plaintiff in the action, the court held that an irrevocable trust was established. The question of admissibility of evidence to show the depositor's intent was raised and, Judge Andrews, speaking for the court, though not expressly deciding the point, indicated a growing tendency on the part of the court to limit the broad rule laid down in *Martin v. Funk*:⁵

¹ *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748 (1903).

² *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446 (1878).

³ *Richardson v. Richardson*, L. R. 3, Equity Cases 686 (1867); *Morgan v. Malleson*, L. R. 10, Equity Cases 475 (1870); *Warriner v. Rogers*, L. R. 16, Equity Cases 340 (1873); *Pye's Case* 18, Vesey 140 (1811).

⁴ 95 N. Y. 209 (1884).

⁵ *Supra* Note 2.

"* * * the character of such a transaction as creating a trust is not conclusively established by the mere fact of the deposit, so as to preclude evidence of contemporaneous facts and circumstances constituting *res gestæ*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund."⁶

It is not surprising, then, that when the question was squarely before the court in a subsequent case, they carried the rule to the conclusion suggested by the dicta of Andrews, J., in the *Mabie* case.⁷ In *Beaver v. Beaver*⁸ a father deposited money in the name of his son, who pre-deceased him. The court refused to find that a trust was created from the form of deposit, without more, declaring that in order to constitute a trust there must be an explicit declaration of trust or other circumstances which show, beyond a reasonable doubt, that a trust was intended to be created.⁹ The Court in this case expressly recognized the growing tendency of people to employ the savings bank trust arrangement for purposes other than that of making gifts to some named beneficiary.¹⁰

The intention of the courts to dispense with the reasoning employed in *Martin v. Funk*¹¹ and to consider the effect of the savings bank trust in the light of the purposes for which it was being used, as indicated by the decision in the *Beaver* case,¹² was firmly established in the *Matter of Totten*,¹³ now the leading case on the subject in this jurisdiction, in which the rule¹⁴ was definitely stated to be:

"* * * a deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish

⁶ *Supra* Note 4, at 210.

⁷ *Supra* Note 4.

⁸ 117 N. Y. 421, 22 N. E. 940 (1889).

⁹ *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626 (1892); *Sullivan v. Sullivan*, 39 App. Div. 99, *aff'd* 161 N. Y. 554, 56 N. E. 116 (1900); *Bath Savings Inst. v. Hathorn*, 88 Me. 122, 33 Atl. 836 (1895); *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89 (1904); *Rambo v. Pile*, 220 Pa. St. 235, 69 Atl. 807 (1908).

¹⁰ "We cannot close our eyes to the well known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons; reasons connected with taxation; rules of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire on the part of many persons to veil or conceal from others knowledge of their pecuniary condition." *Supra* Note 8, at 430, 22 N. E., at 942.

¹¹ *Supra* Note 2.

¹² *Supra* Note 10.

¹³ *Supra* Note 1.

¹⁴ *Supra* Note 1, at 125, 71 N. E., at 752.

an irrevocable trust during the life-time of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his life-time by some unequivocal act or declaration, such as delivery of the pass-book¹⁵ or notice to the beneficiary.¹⁶ In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration, such as delivery of the pass-book or notice to the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.¹⁷ "

Because of the development of this branch of the law, which allows an individual to establish what appears to be a trust complete on its face, and yet still retain control of the trust *res* until his death or some unequivocal act on his part with relation to the deposit, the question is an interesting one whether or not a creditor of the trustee may proceed against these funds to satisfy a debt, before the death of the donor, and after his death, his estate being insufficient to satisfy the valid demands against it. It seems settled, that in view of the policy of the law to regard the deposit as an uncompleted gift during the depositor's life-time, the fund would not be immune from his creditors. The rights of his creditors after his death deserves further consideration. In *Hallett v. Thompson*¹⁸ a legacy was bequeathed absolutely to the defendant by his wife, but by the will the executors were directed to retain it in their hands and put it on interest, and to pay the annual interest to the legatee for life, unless he should by a legal written instrument require the payment of the principal of the

¹⁵ *Matter of Duffy*, 127 App. Div. 74, 111 N. Y. Supp. 77 (2nd Dept., 1908). (A deposit was made in trust for the beneficiary, who predeceased the depositor. Plaintiff, as next-of-kin and heir-at-law of beneficiary, claimed fund was a gift *causa mortis*. Delivery is essential to such a gift. Beneficiary died in possession of the book. This created a presumption it was delivered to her. But the possession of plaintiff rested on a presumption that she obtained the book from the beneficiary, and the possession of the beneficiary gave rise to a presumption that there was a delivery of the book to her by the depositor. This was basing a presumption on a presumption and was not admissible.)

¹⁶ *Matter of U. S. Trust Co.*, 117 App. Div. 178, 102 N. Y. Supp. 271, *aff'd* 189 N. Y. 500 (1907). (A father made a deposit in his own name in trust for his son. He had retained the bank book and had never, so far as appeared, notified the son of the deposit. The son died before the father. The latter made no change in the account, which remained in the form stated until his death. It was held that the trust had never been consummated, but remained tentative until the son's death, when it lapsed *ipso facto*.)

¹⁷ *Tierney v. Fitzpatrick*, 122 App. Div. 623, *aff'd* 195 N. Y. 433, 88 N. E. 750 (1909). (The depositor, after opening account in trust for his son, left the bank book in his son's house, but frequently took it away for a short time for the purpose of having interest written up, etc. He drew out money, or part of it, and the action was against his executrix. *Held*, the leaving of the bank book with the son under the circumstances, which involved a retention and dominion over it, did not make the trust irrevocable.)

¹⁸ 5 Paige 583 (1836).

legacy to himself, in which case the whole was to be paid to him. Action was brought against the defendant by his judgment creditor, and a decision was rendered for the plaintiff, the Court saying it was

"* * * contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes and to be able at the same time to keep it from his creditors."¹⁹

Ullman v. Cameron²⁰ involved a testamentary trust created by the defendant's wife, giving him the income of the fund and any part of the principal as he might desire for the purpose of establishing him in business. Defendant contended that until he exercised his privilege to withdraw the fund it remained a trust and therefore immune from the attack of creditors. The Court denied his argument and rendered judgment for the creditor. Not involving savings bank trusts and being brought by creditors of the *cestui que* trust against the latter rather than creditors of the *settlor* against his right in the funds, these cases are not decisive on the point in question, but are persuasive with respect to the attitude which the courts adopt in refusing to sanction a scheme whereby one can have absolute control and disposition of a fund up to the time of his death, and at the same time keep it from his creditors.

The question of the right of a creditor of the depositor to proceed against the funds after his death was squarely presented in Beakes Dairy Co. v. Berns,²¹ wherein a father deposited money in a savings bank in his name in trust for his son. Having died intestate without revoking the trust, an action was brought by a creditor to have the fund applied to his debt, the estate being insufficient. Judgment was given for the creditor, the Court holding that the fund was a gift completed only at the instant of the death of the donor. Up to that time it was his to draw out and do with it as he pleased. That being so, and it being subject to his creditors during his life-time, it was held to be available to them after his death as well.

It is submitted that the holding in the Beakes Dairy case²² reaches a proper conclusion, for it seems that during the life-time of the depositor, recovery by his creditors against the trust fund is based on an attack against his *right to revoke* the trust, which is a property right. Though the privilege of exercising this right to revoke must necessarily cease with his demise, yet his creditors are not deprived of

¹⁹ *Supra* at 585.

²⁰ 186 N. Y. 339, 78 N. E. 1074 (1906).

²¹ 128 App. Div. 137, 112 N. Y. Supp. 529 (2nd Dept., 1908, opinion by Gaynor, J.).

²² *Supra*.

recovery against the fund, for to allow them to proceed against it after his death is no different in principle from the situation where a creditor sues to have his claim enforced against the legacies of a testator, his debt being unsatisfied in any other way. This conclusion militates against no principle of economic justice, and is entirely consistent with the interpretation of the effect of the savings bank trust deposit as viewed by our courts.

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